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No. 87-1651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DOUGLAS OAKES,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Massachusetts Society for the Prevention of Cruelty to Children (MSPCC) and 29 other organizations serving the needs of children respectfully move for leave to file the attached brief *amicus curiae* in support of the Commonwealth of Massachusetts in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but no response was received.

All 30 *amici* are non-profit private organizations dedicated to protecting and serving the needs of children of all races and religions. 26 of these groups are based in Massachusetts, in many cases providing direct medi-

cal and psychological treatment, shelter, counselling and support services to children who are the victims of child pornography and child sexual abuse. Two *amici* provide services to children in other states (New York and Alaska). Two *amici*, the Child Welfare League of America, and the American Humane Association, are major national organizations providing leadership throughout the 50 states in protecting children from abuse and neglect. A complete list and brief description of each organization are found in the attached Appendix.

All 30 organizations are concerned that the invalidation of the Massachusetts child pornography statute has left children unprotected from even the most vicious child pornography. Because of their unique perspectives as direct service providers treating children victimized by pornography, their families, as well as perpetrators of child sexual abuse, *amici* respectfully seek this Court's leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the theoretical possibility that a criminal statute designed to prevent the sexual abuse and exploitation of children could be applied marginally to activity protected by the First Amendment justifies invalidation of the entire statute on overbreadth grounds and reversal of respondent's conviction without deciding whether the respondent's actions were within the statute's substantial legitimate reach.

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BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Massachusetts Society for the Prevention of Cruelty to Children and 29 other child protective service organizations are dedicated to the protection of children, and to serving children and their families, including perpetrators of child sexual abuse and pornography. *Amici* include two major national organizations and 26 direct service providers serving children at risk in Massachusetts. Two other *amici* provide services to children in other states (New York and Alaska). Several *amici* provide self-help or counselling and therapy services to child sexual abusers. Other *amici* specialize in the long term

residential treatment of victims of child sexual abuse who have themselves become sexual abusers of younger children. (See attached Appendix.)

Amici believe based on their clinical, first hand experience with children and based on scientific research, that child pornography is a significant form of child sexual abuse, and that the use of children in nude, sexually suggestive poses or engaged in sexual conduct plays a significant role in the cycle of child sexual abuse. Pornography is used to blackmail child victims into silence, and photos of past victims are used to seduce future victims into imitative behaviors. Taking sexual photographs of children causes serious long term emotional disturbances in many victims.

The facial invalidation of the Massachusetts child pornography statute has resulted in a number of pending prosecutions being dismissed and has left all the child victims without any legal protection. It has created the appearance of legal approval of sexual photography of children with potentially serious effects on children currently exploited. *Amici* are interested in the outcome of this case because of their direct involvement in assisting the victims of child pornography.

SUMMARY OF ARGUMENT

The Massachusetts Supreme Judicial Court erred in three important respects in construing federal overbreadth doctrine. First, the court relied on a single imaginary hypothetical without considering whether the statute presented a realistic danger of chilling third parties' speech, and without considering whether any overbreadth would be incurable and taint all possible applications of the statute. Second, the court analyzed a child pornography statute as if it were political speech, when there is no danger of eroding core political speech because the statute contains an exception for educational, scientific,

medical and cultural materials. Third, the court erred in facially invalidating a statute without considering alternative narrowing constructions.

The lower court's primary First Amendment concern rested on a single imaginary hypothetical—nude frontal photographs of a one year old on a beach or romping in a wading pool. The federal constitution has never been interpreted to require perfect congruence between the statutory purposes and imaginary, hypothetical overbroad applications of the means. Only where a substantial amount of constitutionally protected conduct is within the sweep of the statute should it be stricken as facially overbroad. Substantial overbreadth has been interpreted to mean that the law could never be applied in a valid manner, or that it is so broad that it might inhibit the constitutionally protected speech of third parties. There must be some showing of a realistic danger of inhibiting third parties' speech. Unlike prior Supreme Court cases, there has been no showing in the case at bar that any pattern of prosecutorial overbreadth in application exists, nor is it likely that reasonable parents would be chilled in their ordinary photography of children by the mere existence of criminal child pornography statutes. (Pages 5-7.)

Any imaginary overbreadth is not incurable, nor would it taint all possible applications of the child pornography statute. The central core of activity included within this statute involves pedophilia, child sexual abuse and exploitation. Child pornography plays a central role in deviant sexual abuse of children by pedophiles. Scientific research since 1982 has shown that photography of children is substantially inseparable from sexual abuse of children, is associated with child prostitution, and it may be a significant factor in the development of later deviant behaviors. Application of the Massachusetts statute to hard core child pornography is not incurably tainted by the hypothetical overbreadth. (Pages 7-9.)

Distinguishing between the untainted hard core pornography and the hypothetical toddler romping at the beach can be accomplished by external, verifiable factual evidence surrounding the method of production of the photographs, the method of collecting and saving the photos, and the actual use of the photos to blackmail or instruct future child victims. (Pages 9-12.)

The lower court erred in treating a child pornography statute as if it were political speech protected at the highest levels of judicial scrutiny. The lower court seemed to believe that either the activity was "speech" and therefore any conceivable overbreadth required facial invalidation, or the activity was "conduct" and completely beyond the scope of the First Amendment. The correct federal constitutional standard for examining a statute addressing child pornography is to ensure that the permissible regulation does not erode protected speech. The Massachusetts statute contains an explicit exemption for educational, scientific, medical and cultural materials. (Pages 12-18.)

The lower court did not consider alternatives to facial invalidation. Two limiting constructions of the statute are possible if the hypothetical overbreadth is viewed as substantial. First, the Court could construe the prohibition on nudity as including only child nudity in a sexual context, relying on the externally verifiable evidence of the methods of production, saving, and use of the photographs. Second, the Court could limit the statute to protecting children from photographs of sexual conduct and post-pubescent nudity. (Pages 18-22.)

Amici urge the Court to consider the effect of facial invalidation on all the children of Massachusetts, who are currently without any protection from the hardest of hard core child pornography. (Pages 22-24.)

ARGUMENT

I. A Single, Imaginary Hypothetical Does Not, Under Federal Law, Justify The Facial Invalidation Of An Entire Statute In The Absence Of A "Realistic Danger" To Third Parties' Speech, Unless The Overbreadth Is Incurable And Would "Taint All Possible Applications" Of The Statute.

The Massachusetts Supreme Judicial Court erred in construing federal constitutional overbreadth doctrine. The Massachusetts court held that the child pornography statute was overbroad because:

> [i]t criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool. Surely the First Amendment protects that kind of activity even if what the defendant did in this case could properly be criminalized (a matter we need not decide). *Commonwealth v. Oakes*, 401 Mass. 602, 605 (1988).

This statement represents the central point in the state court's reasoning in striking down the entire child pornography statute. Three short sentences purporting to apply federal overbreadth doctrine have left not only the Oakes child but every other child in the Commonwealth unprotected from child pornography.

The lower court misunderstood federal overbreadth doctrine, which does not require facial invalidation of an entire statute based on one single imaginary impermissible application. As Justice Brennan explained: "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . ." *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting). To require a statute be so perfectly drawn that not one situation could be imagined which would render

the statute unconstitutional is to require a congruence between the state's legitimate purposes and the means enacted by statute surpassing even the strictest levels of judicial scrutiny under the Equal Protection Clause. Overbreadth doctrine in the First Amendment context does indeed protect our rights to self-expression with heightened judicial scrutiny. But only where a *substantial* amount of constitutionally protected conduct is within the sweep of the statute do the federal courts strike the entire statute as overbroad. *Houston v. Hill*, 482 U.S. ——, 107 S. Ct. 2502, 96 L.Ed.2d 398, 410 (1987).

There has been no showing of any overbreadth in application of the Massachusetts child pornography statute other than a single imaginary situation. For an overbreadth attack to prevail, the challenger must demonstrate substantial overbreadth. The Court has interpreted substantial as requiring that the law either "could never be applied in a valid manner" or that it is so broad that it "may inhibit the constitutionally protected speech of third parties." *New York State Club Association, Inc. v. City of New York*, 56 U.S. Law Week 4653, 4656 (1988). The Massachusetts child pornography statute clearly meets the first test, since there must be some valid applications against child pornography. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982). The second test is likewise met because the Court requires a showing that there must be a "realistic danger" of compromising First Amendment rights of parties not before the Court. *New York State Club Association, Inc. v. City of New York*, 56 U.S.L.W. at 4656. The present facts indicate no actual or threatened prosecutions of parents for innocent photos of their toddlers at the beach.

In *Houston v. Hill, supra*, the Court did find substantial overbreadth in an ordinance which prohibited intentional interference with police officers in the performance of their duties. The *Houston* ordinance had been repeatedly applied to a political activist, and evidence was introduced at trial which demonstrated a long pattern of 200 actual applications of the statute to conduct clearly protected by the First Amendment. *Houston v. Hill*, 96 L.Ed.2d at 408 n.4 and 409 n.5. The contrast between the *Hill* case and the case at bar could not be clearer. *Hill* involved repeated applications of the ordinance in ways which violated the First Amendment, and Hill himself was convicted by the state courts for speech which was protected. In the instant case, Massachusetts prosecutors have not been shown to be engaged in even one prosecution of parents photographing their infants romping at the beach. The Massachusetts child pornography statute is clearly directed to the production of sexually explicit photographs of children.

Unlike *Hill*, there is no demonstrable pattern which might chill the rights of third parties not before the Court. No realistic danger exists that typical family photos will result in criminal prosecutions and no reasonable parent is likely to be chilled in his or her speech.

The normal federal rule is that a statute should not be invalidated further than necessary to dispose of the case before it. *Brockett v. Spokane Arcades, Inc.*, 492 U.S. 492, 502 (1985). The Court observed that unless the identified overbreadth is "incurable" and would "taint all possible applications" of the statute, the normal rule that partial rather than facial invalidation is the required course. *Brockett v. Spokane Arcades, Inc., supra* at 2802.

Any hypothetical potential for overbroad application to parents photographing toddlers at the beach is not likely to taint all the other possible applications of the statute as required by *Brockett, supra.* The role of photography in child sexual abuse by pedophiles is of central importance. "Law-enforcement investigations have verified that pedophiles almost always collect child pornography or child erotica. *Collection* is the key word

here. It does not mean that pedophiles merely view the pornography: They save it. It comes to represent their most cherished sexual fantasies." Lanning, K., *Child Molesters: A Behavioral Analysis for Law-Enforcement Officers Investigating Cases of Child Sexual Exploitation*, National Center for Missing and Exploited Children and the Federal Bureau of Investigation at 17 (1987). Child pornography is used to blackmail children, to instruct future child victims and to condition children by lowering their inhibitions and resistance to sex.[1]

The Massachusetts child pornography statute is clearly directed to photographs of children in sexual contexts. The language of section 29A covers only nudity or sexual conduct, and contains an explicit exception for bona fide scientific, medical, educational or cultural purposes. Any imaginary application of the statute to nude photographs of pre-pubertal children in a non-sexual context is not incurable within the meaning of *Brockett, supra*. The question of whether a particular collection of photographs constitutes an impermissible sexual context is primarily a question of the factual circumstances surrounding the method of production, saving and actual use of particular photos. Any overbreadth in the actual application of

[1] Campagna and Poffenberger, *The Sexual Trafficking in Children*, Auburn House Publishing Co., 1988 at 116-118. See also Goldstein, *The Sexual Exploitation of Children*, Elsevier Science Publishing Co., 1987 at 123-129. "No single characteristic of pedophilia is more pervasive than the obsession with child pornography. . . . Each convicted child molester interviewed either collected or produced child pornography, or both. Most said they had used the material to lower the inhibitions of children or to coach them into posing for photographs." Sen. Comm. on Governmental Affairs, Perm. Sub. Comm. 99th Cong., 2d Sess., Rep. No. 99-537, Child Pornography and Pedophilia at pp. 9-12. "The greatest bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children." U.S. Dept. of Justice, Attorney General's Comm'n on Pornography, Final Report at 68.

the statute should, especially in the context of child sexual abuse, be dealt with on a case by case basis.

The definition of sexual or non-sexual context is, according to current law enforcement investigative practices, identifiable by several factors. FBI Agent Lanning has identified three factors which law enforcement investigators should examine in determining whether the photographs of children are indicative of pedophilia. In production of the photography, pedophiles are likely to use bribery, trickery or seduction. In saving the photographs, pedophiles generally have large numbers of photos all of children in the same age group. The material is generally concealed or hidden. The third factor is the use of the material to blackmail the child victim, and to instruct future child victims. Lanning, K., *supra* at 23-25.

Applying the three salient factors to the hypothetical case of a one-year old romping at the beach, it is clear that none of the aspects of impermissible sexual context would be present. First, the photos would be taken openly, not secretly. No threats to the child's physical well-being, no bribes of drugs, alcohol, money or fame would be needed for a straightforward photo of a romp at the beach. Second, the romp at the beach is most likely to be preserved in a family album together with other family photos of the child fully clothed, and such an album is more likely to be proudly displayed to any person showing the faintest interest than it is likely to be hidden away. Third, a normal family photo is not likely to be used to blackmail the victim by threats of showing it to his or her mother, teacher or friends. Nor is a family photo likely to be used in a sexual activity with other children.

Application of the three factors to the actual facts in the *Oakes* case presents a very different picture. First, the nude photos of the child were taken in secret, with-

out the knowledge of the mother or any other person. Tr. at 37; J.A. 34a. The child was photographed numerous times, nude, in inappropriate lingerie from Fredericks of Hollywood, and with her breasts exposed. Tr. at 24, 65-68; J.A. 21a, 34a-35a. The context in which the photos were taken was clearly sexual and the defendant Oakes told the child that he would take the photos of her as if they were for Playboy magazine. Tr. at 28; J.A. 25a. Second, the photos were kept secret, separate from other family photos of birthdays, Christmas and vacations. The pornographic photos were first kept by Mr. Oakes locked away in a safe. Tr. at 45; J.A. 43a. Later Mr. Oakes moved them to a secret location hidden in the false ceiling of the basement. Tr. at 36; J.A. 34a. Third, the coercive power of Mr. Oakes over the child was manifested when she ripped the photos up and threw them away in the woods. Mr. Oakes forced her to retrieve the pieces of the photos and restore them. Tr. at 27; J.A. 24a. The actual facts of the Oakes case present no innocent romp at the beach, but rather a secretive, coercive, sexually provocative exploitation of a minor child.

The difficulty of distinguishing between impermissible sexual child nudity and an innocent romp at the beach arises because a normal healthy interest in sex is not triggered by pre-pubertal children, nude or otherwise. If the law required a subjective evaluation based on the material's effect on the consumer, as in federal obscenity standards which focus on "appeal to the prurient interest", little of the pedophilia pornography could be reached. The Court in *New York v. Ferber*, 458 U.S. at 756-758, has already recognized that the states' interest in protecting children from pornographic exploitation is not limited to material which meets traditional federal obscenity standards. The central distinction is a shift in focus, away from the subjective assessment of the material's effect on the audience/consumer, and redirected

to the question of the material's effect on the real child involved in the production by examining verifiable facts relating to the production, saving and use of the photos. Thus purely written material involving fantasies of child sexual abuse are not prohibited (unless otherwise obscene under *Miller v. California*, 413 U.S. 15 (1973)). The harm occurs only when a living human child is involved in the produciton of sexual photographs.[2]

Massachusetts and other states must be free to protect our children from the exploitation of child pornography unless there is a realistic danger that our prosecutors, juries and appellate courts are misusing the permissible prohibition against child pornography pretextually to censor socially valuable political speech. The compelling nature of the states' interest in protecting children from sexual exploitation has been amply recognized by the Court.[3] The role of photography itself has been

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[2] *New York v. Ferber*, 458 U.S. at 757 n.9-11, addresses in depth numerous scientific studies prior to 1982 discussing the harm to children from being involved in the production of pornography. "Even if the photographs were never again seen, the very activity involved in creating the photograph is itself an act of sexual exploitation of children, and thus the issues related to the sexual abuse of children and those related to child pornography are inextricably linked." U.S. Dept. of Justice, Attorney General's Comm'n on Pornography, Final Report at 66.

[3] The scientific literature assessing the harm to children from participating in the production of pornography was analyzed in depth by the Court. *New York v. Ferber*, 458 U.S. at 758 n.9-11. *Amici* would like to call the Court's attention to additional scientific research since 1982 regarding the harm to children from participating in pornography. The interrelationship between child pornography and child prostitution was examined in depth by two nationally recognized experts. Davidson, H. and Loken, G., *Child Pornography and Prostitution*, National Center for Missing and Exploited Children, National Obscenity Enforcement Unit, U.S. Dept. of Justice (1987). Mr. Davidson, who is Director of the American Bar Association, National Legal Resource Center for Child Advocacy and Protection, found a significant relationship between child pornography and child prostitution at p. 3-4.

found to be a significant factor in the development of later deviant behaviors among children victimized by pornography.[4]

There has been no showing that any overbreadth in this case would be either incurable or would taint all possible applications of the statute. The only overbreadth addressed by the lower court involved an imaginary situation—toddlers at the beach. Facial invalidation of the entire statute is inappropriate under federal overbreadth standards where there is no pattern of prosecutorial misuse, where no realistic danger exists of chilling third parties' speech, and where the hypothetical overbreadth does not taint all possible applications of the child pornography statute.

II. Analyzing A Child Pornography Statute As If It Constituted Political Speech, Where The Statute Itself Contains An Exception For Educational, Scientific, Medical Or Cultural Purposes, Constitutes Reversible Error In The Application Of Federal Constitutional Law.

The second error in applying overbreadth doctrine to the *Oakes* case involves a misunderstanding of First Amendment analysis as developed by this Court under federal constitutional principles. The central danger of overly broad statutes which may chill or interfere with

[4] Burgess, Hartman, McCausland and Powers, *Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography*, 141:5 Am. J. Psychiatry 656, 661 (May, 1984). The Burgess study evaluated 66 children who had been sexually exploited, assessing their later psychological and social adjustment. The study found that the most serious later behaviors, including documented repetition of the acts on younger children (such as vaginal insertion of objects and sodomizing or urinating on younger children) were significantly related to whether the child had been used in pornography photographs. "The data suggest that when children are used for pornography and are in the sex ring for more than a year the two variables appear to be strongly associated with the development of deviant and symptomatic behaviors."

the rights of third parties not before the Court arises from the vital importance of robust and vigorous debate in a democratic society. The classical example of a dangerously overbroad statute which would substantially interfere with third parties' free speech rights even though the particular defendant might constitutionally be reached is exemplified by a prior restraint statute operating in the context of political speech. Last Term, the Court in *Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611, 4613 (U.S. June 14, 1988), found a licensing ordinance vesting unbridled discretion in the Mayor over newspaper racks on city property dangerously overbroad. Several factors were stressed in the Court's opinion; the potential for a prior restraint, the potential for political pressure resulting from unfettered, standardless licensing power discretion in an elected official, and the central importance of protecting a free and robust press from potential censorship. Having framed the issue as one of prior restraint of political speech, the majority of the Court could not constitutionally tolerate even the potential of overbroad applications.

> [W]e have previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action. It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. *Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. at 4614 (Brennan, J.).

The dissenters in *Lakewood* were less concerned with the potential for future overbroad applications not because of any lack of sensitivity to the dangers of prior restraints and censorship. The dissenters, however, viewed the location of newsracks on city property as essentially separate from the central concerns of protecting

political speech. "Because the placement of newsracks on city propetry is not so protected (*as opposed to the circulation of newspapers as a general matter*), the exception to our usual facial challenge doctrine does not apply here." *Lakewood v. Plain Dealer Publishing Co., Inc.*, 56 U.S.L.W. at 4617 (White, J. dissenting) (emphasis added). "Because the Lakewood Ordinance does not directly regulate an activity protected by the First Amendment, we should instead take the traditional, as-applied approach to adjudication. . . ." *Lakewood v. Plain Dealer Publishing Co., Inc.*, 56 U.S.L.W. at 4621 (White, J. dissenting).

Lakewood thus turns on whether the issue is perceived as closely related to the protection of political speech, in which case the potential for overbroad application cannot be tolerated, or as unrelated (or peripherally related) to political speech in which case the normal processes of case-by-case adjudication should properly be employed. Apparently all members of the Court participating in the *Lakewood* case agreed that *if* the case involved hard core political speech, the mere potential for overbroad application would constitute a serious threat under the First Amendment.

At the other end of the spectrum, the Court has addressed the question of potentially overbroad applications of statutes regulating commercial speech as presenting a less serious threat under the First Amendment. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court observed that the normal justifications for overbreadth doctrine applied weakly, if at all, in the ordinary commercial speech context.

> [T]here are 'commonsense differences' between commercial speech and other varieties. [Since] advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. [Moreover], concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Bates v. Arizona*, 433 U.S. at 381.

This is not to suggest that commercial speech is outside the scope of First Amendment protection, nor that greater scope for governmental regulation of commercial speech should be permitted to erode protections for the core of political speech protected at the highest levels of judicial scrutiny. *Shapero v. Kentucky Bar Assoc.*, 56 U.S.L.W. 4532, 4536 (U.S. June 14, 1988). What is suggested is that the Court requires less perfect congruence in the context of commercial speech, while maintaining the highest levels of required congruence in the context of political speech. *Shapero v. Kentucky Bar Assoc.*, 56 U.S.L.W. at 4536-4537 (O'Connor, J. dissenting).

Distinguishing between political and commercial speech is not always difficult, as the Court found in *Meyer v. Grant*, 56 U.S.L.W. 4516 (U.S. June 7, 1988) (unanimously characterizing a prohibition against paid petition circulators as political speech). It merely seems that way because factually easier cases rarely require review by the highest Court. Despite the intricacies of occasional concurring and dissenting opinions, it is clear that there is substantial common ground among the members of the Court. Potential overbreadth cannot be tolerated under the First Amendment where the case involves the central core of political speech. Less perfect congruence is required, and potentially overbroad future applications are less of a threat, where the activity in clearly a purely commercial transaction. As Justice Stevens observed: "The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context." *New York v. Ferber*, 458 U.S. 747, 778, (1982) (Stevens, J. concurring).

The essential error in the lower court's opinion in *Oakes*, *supra*, arose because of a misunderstanding of the permissible scope of overbreadth doctrine in the context of a statute prohibiting child pornography. The opinion in *Oakes* treats the case as one involving political speech, relying on cases such as *United States v. O'Brien*, 391 U.S. 367 (1968) (involving a draft card burner) and *United States v. Albertini*, 472 U.S. 675 (1985) (involving political activity on federal military bases). The court seemed to view the issue as a question of deciding whether Oakes' activity fell within one or the other of two very rigid categories. *Commonwealth v. Oakes*, 401 Mass. 602, 604-605 (1988). Either the photographs constituted speech, in which case they were to be treated as political speech protected by the very highest levels of judicial scrutiny or the photographs were not speech at all, but rather "conduct", which would be entirely outside the protection of the First Amendment. Not surprisingly, having set up a rigid either/or speech/conduct dichotomy, the court found itself with no alternative but to strike down the entire statute based on potential, hypothetical future misapplications.

If viewed as political speech, it is not surprising that the Massachusetts court would find even a single hypothetical overbroad application dangerous to First Amendment freedoms. The central error is that child pornography cannot plausibly be claimed to constitute political speech, or even the lesser but still protected category of commercial speech. Child pornography, as the Court has unanimously recognized in *New York v. Ferber*, *supra*, is classified as a "category of material outside the protection of the First Amendment." *New York v. Ferber*, 458 U.S. at 763-764. The level of congruence between the state's purpose and the statutory means therefore is not required to be as perfect as if the activity involved political or even commercial speech.

The central issue in the context of speech which is characterized as child pornography is whether the statute

is drawn to preserve protection for socially valuable speech for educational, scientific, medical or cultural purposes. *New York v. Ferber*, 458 U.S. at 774-775 (O'Connor, J., concurring), and 776-777 (Brennan, J., concurring). The Court's central concern is ensuring that lower overbreadth standards for relatively low value speech such as child pornography not be used to chip away at the highest levels of protection accorded political and other socially important speech. The Massachusetts child pornography statute does in fact contain explicit statutory language clearly exempting material "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." Mass. Gen. Laws ch. 272, sec. 29A. Any danger of this particular statute being applied in the future to socially valuable speech rising to the level of political speech appears to be minimal. Nor is there any claim that defendant Oakes' speech itself constituted socially valuable activity rising to the level of political or even commercial speech. His defense at trial consisted of denying he took the photographs. Tr. at 57-61.

This case does not present one of the difficult marginal fact situations where the speech in question can plausibly be construed as either political speech or child pornography. *Amici* do not request the Court to lower its vigilance in preserving our First Amendment freedoms in the context of socially valuable political speech. The Court has already established guidance for the lower courts in recognizing that the degree of overbreadth must be examined in the context of the social value of the speech, and that child pornography is "in its rightful place near the bottom of this hierarchy." *New York v. Ferber*, *supra* at 781 (Stevens, J., concurring).

The lower court erred in treating the child pornography statute as if it were political speech protected by the highest levels of judicially required congruence. There is no danger that the Massachusetts statute is or might be

in the future used to erode protections for socially valuable speech because the statute contains an explicit exemption for educational, cultural, medical and scientific materials. Where there is a very slight possibility of potentially overbroad future applications, it does not require invalidation of the entire statute on its face in the context of child pornography.

III. Facial Invalidation Of A Child Pornography Statute Is Inappropriate Where Alternative Narrowing Constructions Could Cure Whatever Marginal Overbreadth Might Be Imagined.

The third error in the application of federal overbreadth doctrine in the case at bar occurs because the lower court struck down the entire child pornography statute on its face. No prosecutions against pedophiles can, at this point, proceed in Massachusetts. A limiting construction of the Massachusetts statute should have been employed by the state court. However, where the lower court has fallen into plain error by endorsing a broad reading of the statute, it has fallen afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. *Frisby v. Schultz*, 56 U.S.L.W. 4785, 4788 (U.S. June 27, 1988). This Court should construe the statute more narrowly to avoid striking the entire statute because of an imaginary overbroad application to pre-pubertal children in a non-sexual context.[5] In *Frisby, supra*, the Court narrowly construed an ordinance prohibiting residential picketing by interpreting the statute as prohibiting only picketing focused on a single residence and as not containing an exception for labor picketing despite the lower courts' broader reading. As Justice O'Connor observed, a lower court interpretation is not necessarily binding on the Supreme Court. "To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 56 U.S.L.W. at 4788. If the Court is willing to more narrowly construe a statute regulating political speech, as in *Frisby*, then surely a narrowing construction should be entertained as an alternative to facial invalidation in the child pornography context. In the case before us, the Court could more narrowly construe the pre-pubertal nudity provision as banning only photographs taken, saved or used in a sexual context if the Court deems the hypothetical situation as serious enough to constitute substantial overbreadth.

The facts of the actual case before the Court, however, do not even involve a pre-pubertal child. The *Oakes* case involves a thirteen year old, post-pubertal child who was tricked into displaying her body nude in a sexually provocative manner for the gratification of her stepfather. The portion of the Massachusetts child pornography statute which applies directly to the Oakes prosecution is found in Mass. Gen. Laws Ann. ch. 272, sec. 31 (West Supp. 1987), defining nudity in a post-pubertal child as displaying the genitals, pubic areas or the female child's breast below a point immediately above the top of the areola. Thus even if photographing a pre-pubertal child nude in a non-sexual context might hypothetically constitute an overbroad application of the statute, the actual application in *Oakes* involved a separate portion of the child pornography statute which protects adolescent children. It requires no extension of *New York v. Ferber, supra*, to find that photographs of a child's female breasts

[5] Nor should federalism concerns preclude a narrowing construction where a state court has misapplied federal overbreadth doctrine. "While the construction that a state court gives a state statute is not a matter subject to our review . . . this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. . . . [W]e may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents as well as state-court decisions giving the Constitution too little shrift." *New York v. Ferber*, 458 U.S. at 767.

and genitals need not be obscene under *Miller v. California, supra*, standards. Post-pubescent child nudity need not be "portrayed in a patently offensive manner" involving lewd exhibition of the genitals. *New York v. Ferber*, 458 U.S. at 761, 764. While a normal family album might contain occasional photos of naked toddlers, it is most unlikely a family album would contain nude photos of adolescent children romping at the beach.

The Court could, if it deems potential overbroad applications substantial and presenting a realistic danger to free speech, construe the Massachusetts child pornography statute more narrowly on either (or both) of two theories. The Court could limit application to nude photography in a sexual context, requiring factual evidence regarding the production, saving and use of the particular photos in question. This construction has the advantage of support from the statutory language itself and focuses on the actual and compelling legislative purpose to prevent child sexual exploitation. It has the additional advantage of focusing the efforts of law enforcement officials, judges and juries on externally verifiable factual evidence rather than subjective assessments of the appeal or lack of appeal to the prurient interest. Or, the Court could construe the ban on nude photographs as limited to adolescent nudity, and limit application of the pre-pubertal protections to acts which represent sexual conduct. This construction would save three of the four measures in sec. 29A directed to protecting children. Adolescent sexual conduct, adolescent nudity, and prepubescent sexual conduct could still be protected. Only pre-adolescent nudity would present a danger of chilling third parties' free speech under this construction.

Where, as here, the statute itself contains a severability clause,[6] the statute should not be declared unconstitutional in its entirety "unless the invalid provisions are

[6] Mass. Gen. Laws Ann. ch. 604 sec. 8 amended the child pornography statutes to provide a severability clause in 1982.

unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. at 506 and 506 n. 15.[7] Even if the Massachusetts legislature is barred from protecting pre-pubertal children from nude pornography, the protection of prepubertal children from production of pornography depicting sexual conduct and the protection of adolescent children should be allowed.

The well established principle that statutes will be interpreted to avoid constitutional difficulties is fundamental to post-1937 federal constitutional law. Justice Brandeis' famous concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936), sets forth the basic tenents of judicial power. Two of those factors are applicable in the instant case.

> [3.] The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' [4.] The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Ibid.*

The precise facts of the *Oakes* case do not require any present decision on the question of whether nude photo-

[7] Massachusetts caselaw also favors a narrowing construction where possible to save statutes. *Commonwealth v. Lammi*, 386 Mass. 299, 301 (1982); *Commonwealth v. O'Neil*, 233 Mass. 535, 540-541 (1919). Severability is also favored over facial invalidation. *Mayor of Boston v. Treasurer*, 384 Mass. 718 (1981).

graphs of pre-pubertal children in a non-sexual context violate the First Amendment, since *Oakes* involves a post-pubertal child in a sexual context. Whatever slight possibility exists for future overbroad applications can and should be cured short of facial invalidation of the statute by a narrowing construction.

The Massachusetts Society for Prevention of Cruelty to Children and the many other child protective service groups which have joined in this *amicus* brief urge the Court to consider the effect of facial invalidation on all the children of Massachusetts, as well as children in other states. *Amici* do not believe that there is any realistic danger of overbroad prosecutions of innocent parents photographing their toddlers, nor do *amici* believe that any reasonable parents would be chilled in customary photography of their children. The experience of the child protective agencies has not indicated that the elected officials vested with prosecutorial discretion in Massachusetts have engaged in a pattern of harassing innocent parents with prosecutions for child pornography. *Amici* urge the Court to uphold the Massachusetts child pornography statute on the grounds that any overbreadth is hypothetical, not substantial, and does not present any realistic danger to free speech.

Amici also urge the Court to consider the effect of facial invalidation on the Oakes child herself. This child believed strongly enough that her stepfather's actions were improper sexual exploitation to endure the pain and humiliation of publicity and testimony. Any adolescent child is normally embarrassed about his or her developing body. She has endured having her bodily developments repeatedly exposed in three contexts: for her stepfather's gratification, in courtroom testimony and in all the various publicity that has surrounded this case both locally and through defendant Oakes' appearances on a national television talk show. The niceties of overbreadth doctrine will in all likelihood not be understood by the

Oakes' child or other children subjected to sexual exploitation. *Amici* urge the Court to make it clear that the highest law of our civilization does not condone or ratify sexual photography of children.

For all these reasons, *amici* hope the Court will uphold the Massachusetts child pornography statute and defer any decision on non-sexual pre-pubertal photos until such a situation is actually presented, if ever. If the Court is unable to uphold the statute in its entirety because the Court believes a genuine danger to free speech exists, *amici* request that the Court narrow the construction of the statute to save whatever portions may be found constitutional. The importance of a saving construction lies at the heart of the concern for *amici* who provide protection, counselling and services to many troubled families. Some measure of legal protection establishing limits on the sexual exploitation of children is centrally important to all the children of Massachusetts. Facial invalidation leaves even the hardest-core child pornography victims without protection, while a narrowing construction could save at least some of these children.

The third alternative, referral to the state court on the issue of a narrowing construction or severability, is the least desirable result short of actual facial invalidation in the opinion of *amici*. It will continue to leave the children of Massachusetts unprotected from child pornography for the lengthy period of appellate review. Currently our children have been without legal protection since February 1, 1988, and extending that period by even one additional year is very serious in the eyes of *amici*. The child pornography industry is a lucrative business and prolonged periods of legal limbo raise the possibility that commercial child pornographers may attempt to profit from the loophole at the expense of our children.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court should be reversed and the conviction should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX

DESCRIPTION OF AMICI ORGANIZATIONS

MASSACHUSETTS SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN (MSPCC) was founded in 1878 as a statewide agency dedicated to improving family life and protecting children. MSPCC has a staff of 200 people and serves almost 10,000 clients annually, many of whom have been sexually abused. MSPCC provides a range of direct treatment services for sexual abuse victims and their families. MSPCC's experience is that child pornography perpetuates the sexual victimization of children with long term emotional consequences for the children exploited.

National Organizations

AMERICAN HUMANE ASSOCIATION for more than 112 years has led national efforts to protect children from abuse and neglect. As a nationwide association of agencies and individuals, AHA through its Children's Division provides training for health, law enforcement and legal professionals, brings expert assistance to state child protective programs, publishes research, promotes national standards and maintains a national data base on child abuse and neglect.

CHILD WELFARE LEAGUE OF AMERICA is a national organization comprised of 450 leading child welfare agencies in the United States and Canada with 1200 affiliates in 27 state associations. Founded in 1910 at the request of President Theodore Roosevelt, the Child Welfare League is the only privately supported organization in North America solely devoted to improving services for deprived, neglected and abused children whose membership includes both voluntary and public, religious and nonsectarian agencies.

State Organizations

BOSTON CHILDREN'S SERVICE ASSOCIATION is the successor to New England's oldest private charitable organization founded in 1799. In 1987 it served more than 2,500 children and families, many of whom had experienced child sexual abuse and child pornography. Its experience has shown that child pornography can cause lasting harm to children.

BRIGHTSIDE FOR FAMILIES AND CHILDREN based in Springfield, Mass., offers therapeutic treatment for children and their families in New England and New York. Founded in 1881, Brightside employs 160 people and served 4,830 clients in 1987.

CAMBRIDGE FAMILY AND CHILDREN'S SERVICE founded in 1873, provides counselling, adoption, mediation, support, training, rehabilitation and prevention programs. It has a 40 member professional staff and 50 trained volunteers.

CATHOLIC CHARITIES—ARCHDIOCESE OF BOSTON founded in 1903, is the major social service agency of the Roman Catholic Church in the greater Boston area. Catholic Charities serves people of all faiths and provides a wide range of social services to children. In 1987 more than 3,500 children were served through protective services, foster care and day care programs.

COMMUNITY COUNSELLING CENTER OF BLACKSTONE VALLEY, INC. is a community based agency providing substance abuse treatment, mental health and social services in the 15 towns of the Blackstone Valley in Massachusetts. CCC has 55 staff and serves 1,500 clients annually. Children and their families are the primary client population, and CCC provides treatment for victims of sexual abuse.

COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES, INC. is a city wide agency in New York

City. CHCF provides cultural awareness training courses for social service providers working with Hispanic children and families, provides training in the Hispanic community on child abuse and neglect and provides policy development resources.

DIMOCK COMMUNITY HEALTH CENTER founded 115 years ago, it based in Roxbury, Massachusetts and provides comprehensive ambulatory health care services to the poor and near poor. It is one of the largest health centers in Boston and has a model health vocational training program with over a dozen independently operated health programs.

FAMILY CONTINUITY PROGRAMS, INC. offers a wide range of family treatment services with six offices throughout Massachusetts employing 80 full time staff. The agency has experienced ever increasing incidents of child sexual abuse cases since 1985.

FAMILY SERVICE OF GREATER BOSTON founded in 1835, is a voluntary human service organization providing sexual abuse treatment, drug and alcohol rehabilitation, advocacy programs, a licensed mental health clinic and a certified home health agency.

THE HARBOR SCHOOLS, INC. provides services to severely disturbed children and their families including crisis and ongoing family intervention, individual and group psychotherapy, job training, special education and alternative family placement.

ITALIAN HOME FOR CHILDREN is a long term residential treatment facility providing services to emotionally disturbed children of all races from Massachusetts and bordering New England states. Many of the 50 children between 5 and 13 years old accepted annually into its residential and emergency shelter programs have suffered sexual abuse. The Italian Home's experience is that child pornography causes long term emotional disturbance in most cases.

KEY PROGRAM, INC. serves troubled adolescents statewide with a staff of 300 serving 3,200 adolescents annually in residential and non-residential settings. Many of KEY's clients have a history of sexual abuse, including use of adolescents in pornographic material.

MASSACHUSETTS ASSOCIATION FOR MENTAL HEALTH, INC. founded in 1913 has chapters throughout the Commonwealth. MAMH is concerned with the growing number of sexually related child abuse cases and has found that child pornography is exploitation of defenseless minors.

MASSACHUSETTS COUNCIL OF HUMAN SERVICE PROVIDERS represents almost 600 nonprofit agencies providing a variety of human services. It is concerned with the development of sound, progressive social policies and works with the executive department, state legislature, state agencies, advocacy groups and philanthropic organizations.

NEW BEDFORD CHILD AND FAMILY SERVICE founded in 1843 serves southeastern Massachusetts, providing protective service to children who are victims of sexual abuse, their siblings and to perpetrators of child sexual abuse, in addition to other programs. It serves about 5,800 clients annually with a staff of 100.

NEW ENGLAND HOME FOR LITTLE WANDERERS founded in 1865 provides services to severely troubled children and their families, including residential treatment, day treatment, foster family placement and counselling. It has a staff of over 250 serving about 1,000 children annually, many of whom have been sexually abused. Child pornography has proven to be a destructive experience in the experience of the agency.

PARENTS ANONYMOUS OF MASSACHUSETTS assists parents in breaking the cycle of child abuse. It is a self-help organization providing safe, supportive weekly

meetings where parents under stress can discuss their problems. It serves over 2,000 people annually.

SPRINGFIELD HOME FOR FRIENDLESS WOMEN AND CHILDREN, CHILDREN'S STUDY HOME based in Springfield, Massachusetts is a multi-service agency founded in 1865 serving about 600 families annually with a staff of 100. It provides educational, day and residential treatment, therapy, and protective services to children.

STEVENS—CHILDREN'S HOME, INC. founded in the 1930s provides residential treatment for 30 emotionally disturbed boys experiencing serious behavioral problems. Over 33% of the boys are known victims of sexual abuse and have themselves become the sexual abusers of younger children. Child pornography clearly contributes to this serious problem in the experience of the agency.

TRAVELERS AID SOCIETY OF BOSTON, INC. serves the needs of a mobile population including runaway children, homeless, unemployed, deinstitutionalized people, refugees, abused women and tourists. TAS served 59,481 people in 1987 and provided counselling or emergency assistance to 4,930 people.

UNITED WAY OF MASSACHUSETTS BAY, INC. founded in 1935 conducts an annual volunteer fund raising drive which provides financial support to over 200 human service agencies. United Way agencies serve 1.7 million people in 81 cities and towns.

WAYSIDE, INC. operates eight programs serving adolescent children including an emergency shelter, group home and school, a day treatment program and transitional apartment program. A large percentage of children served have a history of sexual abuse which contributed to their inability to live and function in the community. Child pornography is child abuse in Wayside's experience.

WOMEN'S ALLIANCE AGAINST PORNOGRAPHY, Cambridge chapter, provides public education about the harms of pornography and advocates legislative reform efforts to address this abuse.

WOMEN AND CHILDREN'S HEALTH ASSOCIATES of Palmer, Alaska, provides services including prevention and early intervention for family violence and child abuse, and has provided leadership for statewide effort to prevent child sexual abuse.

WORCESTER CHILDREN'S FRIEND SOCIETY founded in 1849 provides mental health and advocacy services to about 1,000 children with a staff of 30. Over 35% of its clients are victims of physical or sexual abuse.

YOUTH OPPORTUNITIES UNLIMITED, INC. serves about 2,000 adolescent children with a staff of 60 annually providing residential treatment, counselling, special education and advocacy programs. Its experience with behaviorally disturbed adolescents demonstrates the myriad of problems occurring when children are sexually victimized.

YOUTH OPPORTUNITIES UPHELD, INC. served 1,348 children and their families with 90 staff providing preventative and rehabilitative social, psychological, educational and vocational services. The majority of Y.O.U.'s clients are victims of sexual abuse and it is their belief that child pornography contributes to this problem.